

January 1966

DeGaulle's Republic and the Rule of Law: Judicial Review and the *Conseil d'Etat*

George D. Brown

Boston College Law School, browngd@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lfsp>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

George D. Brown. "DeGaulle's Republic and the Rule of Law: Judicial Review and the *Conseil d'Etat*." *Boston University Law Review* 46, (1966): 462-492.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

DE GAULLE'S REPUBLIC AND THE RULE OF LAW: JUDICIAL REVIEW AND THE CONSEIL D'ETAT

GEORGE D. BROWN*

Americans tend to regard France as a somewhat despotic country where drivers' licenses are summarily revoked by roadside tribunals, political opponents are treated badly, and in general the rule of law is lightly regarded.¹ From time to time disgruntled Frenchmen come forward to reinforce this picture.² Against such a background of illiberalism, the lack of judicial review of legislation in France does not seem surprising. And it has become a commonplace to present the French hostility to judicial review as a polar example of attitudes toward this institution.³ Yet there are ample signs that this generalization needs to be reexamined. To begin with, influential French jurists have long advocated judicial review. Second, the institutions of the Fourth and Fifth Republics show a slight shift in its direction. Third, some of the political left's traditional hostility to judicial review may have softened. Fourth, and most importantly, the *Conseil d'Etat*, the supreme administrative court, has demonstrated the value of an independent judicial body in protecting citizens from arbitrary governmental actions. Indeed, under the Fifth Republic, the *Conseil d'Etat* has been exercising a kind of judicial review. This article will first examine the current status of judicial review in France and will then focus on the recent work of the *Conseil d'Etat* as a possible source of future developments.

FRENCH VIEWS ON JUDICIAL REVIEW

Since the Revolution, the French courts have steadfastly refused to consider constitutional objections to laws passed by Parliament.⁴ French jurists, however, have not been unanimous in defending this practice. In fact, the debate over judicial review has "polarized" French legal thought since the end of the nineteenth century.⁵ Major figures in French public law such as Hauriou and Duguit have advocated review.⁶ Currently,

* Assistant Professor of Law, Boston University; LL.B., Harvard, 1965.

¹ E.g., Private War of Prefect Bruneau, *Time*, Aug. 19, 1966, p. 30.

² E.g., Mitterand, France is no longer a Democracy, *N.Y. Times*, May 29, 1966 (*Magazine*), p. 14; Revel, *The French* (1966).

³ E.g., Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 *Harv. L. Rev.* 1207, 1212, 1219 (1966) [hereinafter cited as Cappelletti & Adams].

⁴ E.g., Arrighi, *Conseil d'Etat*, Nov. 6, 1936, [1938] D. III. 1, [1937] S. III. 33, translated in von Mehren, *The Civil Law System* 181 (1957) [hereinafter cited as von Mehren].

⁵ Batailler, *Le Conseil d'Etat, juge constitutionnel* 9 (1966) [hereinafter cited as Batailler].

⁶ Von Mehren 168-69.

the opinion of legal writers (*la doctrine*) seems generally favorable to it.⁷

The historical background of the traditional attitude is well-known: the Revolution's hostility toward the *Parlements* of the *Ancien Régime*.⁸ These exceedingly powerful courts exercised a form of judicial review of the royal edicts⁹ and maintained an obstructive supervision over the administration.¹⁰ The leaders of the Revolution were opposed to any control over popular assemblies, and particularly hostile to the judiciary's social class, the *Noblesse de Robe*. Thus the *Parlements* were abolished, and the Constitution of 1791 forbade judges to interfere with the exercise of legislative power or to suspend the execution of laws.¹¹ Modern French Constitutions have not expressly forbidden judicial review of laws, but the fundamental codes carry on the Revolutionary tradition of the subordination of the courts to Parliament.¹²

There is no longer such active opposition to the judiciary as a class.¹³ However, civil law concepts of the role of the judge, themselves a product of the Revolutionary and Napoleonic attitudes, undoubtedly militate against judicial review.¹⁴ The judge's function is regarded essentially as one of applying the law, working within the guidelines laid down by the Code. Although modern civil law thinking has recognized the important, and often independent role that the judge does in fact play,¹⁵ he is still regarded as a subordinate in the law-making process.

The major reason for the non adoption of judicial review lies in the dominant concept of French republican theory: the supremacy of Parliament as the voice of the "general will."¹⁶ "National sovereignty belongs to the people who exercise it through their representatives. . . ."¹⁷ Parliament was the only organ elected by universal suffrage until 1962 when this also became the method for choosing the President. Thus Parliament was the sole expression of the general will, and its acts could not be controlled by any other body. The French describe this tradition as one of separation of powers, but it differs from the American

⁷ Batailler 17.

⁸ David & de Vries, *The French Legal System* 30 (1958).

⁹ Cappelletti & Adams 1210.

¹⁰ Waline, *Droit administratif* 24-25 (9th ed. 1963).

¹¹ Constitution of 1791, title VII, arts. 202-03.

¹² E.g., Code Civil arts. 4, 5 (65th ed. Dalloz 1966).

¹³ But see p. 465 *infra*.

¹⁴ Drago, *General Comparative View of the French Constitution*, 21 *Ohio St. L.J.* 535, 546 (1960).

¹⁵ See von Mehren, *Book Review*, 63 *Harv. L. Rev.* 370-71 (1949); Carbonnier, *Droit civil* 17-18 (6th ed. 1965).

¹⁶ Drago, *supra* note 14, at 546.

¹⁷ Constitution of 1958, art. 3.

notion of that term as comprising checks and balances.¹⁸ Furthermore, the French concept is essentially hierarchical;¹⁹ in any conflict the legislature must prevail, even if, for example, it invades the province of the judiciary.

This tenet of the inviolability of the legislature's will has led to a certain dilemma about the place of the Constitution. If the legislature can do anything it wants, it can pass a law inconsistent with the Constitution. Yet this document supposedly occupies a predominant place in the hierarchy of laws. Carré de Malberg, the leading defender of legislative supremacy, solved the dilemma by denying that the Constitution was superior to the law.²⁰ Both are expressions of the general will, the law being the most recent. As one critic summarized Carré de Malberg's position, "the Constitution becomes one law among others, first in age, but without superiority over the others."²¹ Of course, it is not necessary to go this far. Many French republicans have recognized the supremacy of the Constitution and have hoped that the legislature would not violate it.²² They have concluded, however, that the only solution is to leave the legislature as the sole judge of its acts.

If laws are to be reviewed to determine their "constitutionality," the Constitution must furnish some applicable standards. French Constitutions have primarily been descriptions of the structure of government²³ and have lacked broad clauses of the "due process" type which provide bases for the development of standards. The Constitution of the Third Republic "omitted any reference to protection of civil liberties. . . ."²⁴ The Constitutions of the Fourth and Fifth Republics do invoke the "Declaration of the Rights of Man and of Citizens" in their preambles. And the Fourth Republic's preamble announces other general principles which are reaffirmed in the current preamble.²⁵ However, French jurists have been reluctant to consider the preamble as of equal force with the rest of the Constitution.²⁶ "In contrast to the guarantees of individual rights set forth in the Federal and State Constitutions in the United States, directly applied and construed by the courts as law, the Preamble of the French Constitution is essentially a statement of political aspira-

¹⁸ Cappelletti & Adams 1211-12.

¹⁹ Batailler 165.

²⁰ See *La loi, expression de la volonté générale* (1931).

²¹ Batailler 164.

²² See Burdeau, *Droit constitutionnel et institutions politiques* 106 (1965).

²³ Batailler 90.

²⁴ David & de Vries, *op. cit. supra* note 8, at 62.

²⁵ "The French people solemnly proclaims its attachment to the rights of man and to the principles of national sovereignty as defined by the Declaration of 1789, confirmed and completed by the preamble of the Constitution of 1946." Constitution of 1958, Preamble.

²⁶ See Chapus, *De la soumission au droit des règlements autonomes*, [1960] *D. Chron.* 119, 120-22.

tion, an acknowledgment of the existence of fundamental individual rights, and an outline of a program to be rendered effective by legislative action."²⁷ It has been questioned whether the French Constitution could be regarded as the expression of a "common ethical standard," in view of the lack of an underlying national consensus.²⁸ (The existence of such a consensus has perhaps been an important factor in the acceptance of judicial review in the United States.)²⁹ Rather there has been a tendency to view it as "a symbol of the political regime, a document identifying the nature and political organization of Empire, or Monarchy, or Republic."³⁰

The above are the principal causes of the tradition's duration through the present day. Several other factors are worthy of mention. Many Frenchmen have invoked the example of the United States Supreme Court during the period when it invalidated liberal legislation.³¹ During the 1946 constitutional debates, one influential politician reminded his colleagues that "the American experience with the Supreme Court has proved that it is dangerous to entrust the judiciary with the control of the constitutionality. Such a 'government by the judges' enhances the powers of the reactionary forces and slows down any evolution toward progress."³² Increased awareness of the Supreme Court's recent work³³ may tend to mute this objection. However, many Frenchmen feel that the Supreme Court's main function is to "umpire" the federal system. Judicial review is seen as less important in a unitary country such as France.³⁴ Finally there is the argument that, since the Fourth and Fifth Republic Constitutions provide for limited review of constitutionality by a special body, there is an implicit ban on any review by the courts.³⁵

Those who favor judicial review base their arguments on the supremacy of the Constitution as the highest law in the state. This concept can be traced back to French legal thinkers of the sixteenth century.³⁶ For the advocates of judicial review the Constitution is not a "mere political program," but the highest law within the hierarchy of laws.³⁷

²⁷ David & de Vries, *op. cit. supra* note 8, at 61.

²⁸ Grosser, *The Evolution of European Parliaments*, Daedalus, Winter 1964, p. 153, 156.

²⁹ Hartz, *The Liberal Tradition in America* 9-10 (1955).

³⁰ David & de Vries, *op. cit. supra* note 8, at 61-62.

³¹ E.g., Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis* (1921).

³² Constitutional Committee of the Second Constituent Assembly, session of July 11, 1946, remarks of the chairman (André Philip), in von Mehren 162.

³³ E.g., Tunc & Tunc, *Le droit des Etats-Unis d'Amerique, sources et techniques* (1955).

³⁴ Burdeau, *op. cit. supra* note 22, at 99-100; Tunc, *The Fifth Republic, The Legislative Power, and Constitutional Review*, 9 *Am. J. Comp. L.* 335 (1960).

³⁵ Batailler 30-32. The work of these bodies is described at pp. 467-69 *infra*.

³⁶ Cappelletti & Adams 1210.

³⁷ Batailler 12.

The will of the people acting as the constituent power is viewed as superior to the will of the people acting through their elected representatives in the making of normal laws.³⁸ The fact that the Constitution, particularly today, is enacted and amended by a special procedure lends support to this argument.³⁹

The Constitution thus becomes the cornerstone of *la légalité*, the rule of law. And individuals need protection from violations of *la légalité* by the legislature as well as by the executive.⁴⁰ Furthermore, the principle of the separation of powers is not violated.

Neither the legislature nor the judiciary can do any act that would be contrary to the decision of the constituent power. If the legislative power violates a constitutional rule, it cannot impose upon the judicial powers the obligation of joining in this violation. The latter remains sovereign and independent in its own field, and cannot be compelled by the legislative power to violate the constitutional law.⁴¹

Those who insist that judges should not apply unconstitutional laws have encountered the problem of what the source of "constitutionality" should be. They maintain that the courts can find applicable standards in the Preamble and the Declaration of the Rights of Man.⁴² This approach would inevitably lead to a creative and independent role for the judiciary, such as the *Conseil d'Etat* has played in developing "general principles of law."⁴³ Yet some of the advocates of judicial review seem unwilling to admit this. They describe the judge's role as the mere "confrontation" of two rules to see if they are consistent.⁴⁴

The parties of the left have traditionally been hostile to judicial review.⁴⁵ Yet their experience under the De Gaulle regime has led many liberals to conclude that judicial guarantees against arbitrary government action are necessary. In July 1966, the Federation of the Democratic and Socialist Left, whose candidate received forty-five per cent of the vote in the 1965 presidential election, issued its platform (*Programme*) for the 1967 legislative elections. Article two, section one declares:

The battle of the left has always been the battle for liberty. The defense of liberty is first of all the assurance of the respect for law against arbitrary action by the state itself. The creation of a Con-

³⁸ 3 Duguit, *Traité de droit constitutionnel* 668-69 (2d ed. 1923), quoted in von Mehren 168.

³⁹ Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 *Harv. L. Rev.* 801, 835 (1959).

⁴⁰ Hauriou, *Précis de droit constitutionnel* 287-88 (2d ed. 1929), quoted in von Mehren 168-69.

⁴¹ Duguit, *op. cit. supra* note 38, at 668-69.

⁴² Duverger, *La Cinquième République* 172 (3d ed. 1963).

⁴³ See text at notes 103-25 *infra*.

⁴⁴ Batailler 10.

⁴⁵ See the excerpts from the 1946 constitutional debates quoted in von Mehren 157-164.

stitutional Supreme Court corresponds to this desire. This court, placed at the summit of the judicial branch, and separate from the executive, will have the mission of ensuring the constitutionality of laws and the independence of the judiciary. The Court, composed of nine judges, will have a wider jurisdiction, a greater authority, and better guarantees of independence than the current Constitutional Council which has not fulfilled the mission the Constitution entrusted it with.⁴⁶

The platform of M. Jean Lecanuet's center party also calls for the creation of a Supreme Court.⁴⁷

Dissatisfaction with the Fifth Republic's halfway approach to judicial review—the Constitutional Council—is an important factor in this attitude, and at this point it is necessary to examine briefly this institution and its Fourth Republic predecessor.

THE HALFWAY APPROACH TO JUDICIAL REVIEW

Frenchmen, said to be logical, have been troubled by the fact that while the Constitution is supposed to be superior to ordinary laws, the legislature need not observe it. Allowing the legislature to be the sole judge of the constitutionality of its acts has seemed inadequate to many. With the judiciary deemed unfit to exercise this control, there have been numerous attempts to find someone else to exercise it.⁴⁸ In 1946 there was serious consideration of submitting questions of constitutionality to the people via referendum, but this solution was not adopted.⁴⁹ The most frequently suggested technique has been that of a semipolitical body, separate from the assembly. Sièyes suggested a "constitutional jury" along these lines as early as 1797.⁵⁰ The concept reappears in the Constitutional Senates (*Sénat Conservateur*) of the nineteenth century. These bodies are considered to have been "completely useless" as constitutional guarantors.⁵¹ The Constitutional Committee (*Comité Constitutionnel*) of the Fourth Republic did not play an appreciable role either, but it merits brief consideration as a step beyond the Third Republic's solution of the assembly as sole judge of its acts.

The *Comité Constitutionnel* is generally regarded as having been "more political than judicial."⁵² Its members were the President of the

⁴⁶ *Le Populaire de Paris*, Aug. 25, 1966, p. 2, col. 3. A summary is printed in *Le Monde*, July 17-18, 1966, p. 4.

⁴⁷ *Le Monde*, July 17-18, 1966, p. 5, col. 2. In September the small but influential Parti Socialiste Unifié announced its opposition to the creation of a Constitutional Court on the ground that such a court would be a reactionary force. *Le Monde*, Sept. 23, 1966, p. 6, col. 1.

⁴⁸ Waline, *The Constitutional Council of the French Republic*, 12 *Am. J. Comp. L.* 483 (1963).

⁴⁹ Burdeau, *op. cit. supra* note 22, at 106.

⁵⁰ *Id.* at 95.

⁵¹ Batailler 29.

⁵² Waline, *supra* note 48, at 484.

Republic, the Presidents of the Assembly and of the Senate (Council of the Republic), and seven members elected by the Assembly and three elected by the Senate. The elected members were chosen each year from outside Parliament.⁵³ The Committee's task was to "examine whether the laws voted by the National Assembly presuppose an amendment of the Constitution."⁵⁴ If the Committee sent back the law, it presumably could not be promulgated unless the amendment procedure, involving both houses, was followed.⁵⁵ In fact, its main function appeared to be to conciliate between the two houses.⁵⁶ The Committee only rendered one decision, and that was in a matter of minor importance.⁵⁷

Its successor, the *Conseil Constitutionnel* figures prominently in the Constitution of the Fifth Republic,⁵⁸ and in the early days of the regime it seemed likely to become one of the important organs of the state.⁵⁹ This promise has not been fulfilled. The Council has not played a major role as "guardian of the Constitution."⁶⁰ Instead, it has served as guardian of the executive's prerogatives against encroachment by the legislature and has also carried out its functions in a "political" rather than a "judicial" manner.⁶¹

The Constitutional Council has nine regular members who serve nine year terms. The President of the Republic and the Presidents of the two houses each elect three. Former Presidents of the Republic are members *ex officio*. The Council has many functions including the supervision of presidential elections (article 50), the supervision of referenda (article 60), and jurisdiction over disputed parliamentary elections (article 59).⁶² The Council's control over the constitutionality of laws is spelled out principally in article 61. After a law has been voted, and before its promulgation by the President of the Republic, the Prime Minister, the President himself, or the President of either house of Parliament can ask the Council to rule on its conformity with the Constitution. If none of these four objects to the law on constitutional grounds, there is no way for anyone else to get a ruling. On the other hand, certain laws must be passed on by the Council before taking effect. These are Parliament's own rules (article 61), and the limited category

⁵³ *Ibid.*; see Engel, *Judicial Review and Political Preview of Legislation in Post-war France*, 6 *Inter-American L. Rev.* 53-57 (1964).

⁵⁴ Constitution of 1946, art. 91.

⁵⁵ Burdeau, *op. cit. supra* note 22, at 107.

⁵⁶ Waline, *supra* note 48, at 484-85; see Constitution of 1946, art. 92.

⁵⁷ Batailler 30.

⁵⁸ Constitution of 1958, title VII.

⁵⁹ Williams & Harrison, *De Gaulle's Republic 134-35* (1960) [hereinafter cited as Williams & Harrison].

⁶⁰ The phrase is Professor Tunc's, Tunc, *supra* note 34, at 341.

⁶¹ Batailler 32-33, 45-53; see Drago, *supra* note 14, at 545-46.

⁶² For general descriptions of the *Conseil Constitutionnel* see Duverger, *op. cit. supra* note 42, at 157-71; Engel, *supra* note 53, at 57-65; Waline, *supra* note 48.

known as "organic law" (articles 46 and 61). These are mainly "laws defining aspects of the organization or the relations of the public powers."⁶³

Certainly the Council's functioning is far removed from American notions of judicial review. It does not have the guarantees of impartiality and independence associated with a true court. It acts only before a law has gone into effect, and is in no way open to the individual citizen who may be harmed by the law.⁶⁴ In fact, the Council's main function has been a relatively nonjudicial one. The 1958 Constitution breaks with French republican tradition in restricting the legislature to a certain sphere of action specifically delineated.⁶⁵ All other matters belong to the Government (cabinet) to regulate by decree. The Constitutional Council's role has been to prevent the legislature from attempting to enact laws outside its own sphere.⁶⁶ The Council itself recognized this in 1962 when it invoked "the spirit of the Constitution which has created in the Council an organ to regulate the activity of the public powers."⁶⁷ In this "regulation" the Council has tended to limit the jurisdiction of Parliament and to give the Government's decree power a broad field of action.⁶⁸

Thus the "constitutionality" of a law is a question of whether it is within the specifically defined legislative power. Whether Parliament has violated the general principles invoked by the Preamble is irrelevant. The Council has not extended its definition of constitutionality to include these principles, and most observers conclude that it will not do so.⁶⁹ The Council is not really a constitutional court at all.⁷⁰ It is, however, a step beyond the Committee of the Fourth Republic. The fact that the Council is criticized for not being enough of a constitutional court is perhaps indicative of future developments. To some extent, France already possesses such a court: the *Conseil d'Etat*.

THE CONSEIL D'ETAT

The *Conseil d'Etat* is the highest body within the French administration. It serves as both the administration's adviser and its judge. The

⁶³ Waline, *supra* note 48, at 490.

⁶⁴ Cappelletti & Adams 1212-13.

⁶⁵ See p. 477 *infra*.

⁶⁶ Waline, *supra* note 48, at 485.

⁶⁷ Quoted in Burdeau, *op. cit.* *supra* note 22, at 110-11.

⁶⁸ Chapsal, *La Cinquième République* 76-77 (*Les Cours de Droit* 1962-63); Batailler 45-53. But see Cohen, *La jurisprudence du Conseil Constitutionnel relative au domaine de la loi d'après l'article 34 de la Constitution*, 1963 *Revue de Droit Public* 745.

⁶⁹ Batailler 44-45; Drago, *supra* note 14, at 547-48. Contra, Duverger, *op. cit.* *supra* note 42, at 173. M. Duverger bases his argument on the fact that the Fourth Republic's Constitution forbade the Comité Constitutionnel to apply the preamble, while the new Constitution contains no such restriction on the powers of the Conseil.

⁷⁰ Cappelletti & Adams 1210-11. Contra, Waline, *supra* note 48, at 488.

judicial section of the Conseil (the *Section du Contentieux*), is the supreme court for administrative matters, and is probably the most prestigious judicial body in France.⁷¹ The *Conseil d'Etat* was created by Napoleon at the heart of his administrative structure to replace the old *Conseil du Roi*. Since disputes involving the administration could not be heard by the regular courts, one section of the Conseil soon developed into a separate court to hear these matters.⁷² Until 1953 it had been the main administrative court; in that year lower "administrative tribunals" were established.⁷³ The idea that the administration could thus judge itself seemed to many critics, both French and English,⁷⁴ inconsistent with the dictates of judicial impartiality. However, the *Section du Contentieux* developed an attitude of complete independence, and most French commentators feel the Conseil has been more effective in protecting the rights of individual citizens than the regular courts would have been.⁷⁵ It is also noteworthy that the *Conseil d'Etat's* own case law has been the dominant force in the development of administrative law. Legislation has, of course, played a large role in this area, but the Conseil's position is quite unlike that of the regular courts which are, in theory at least, merely applying the provisions of the Codes.

Many excellent treatments of the Conseil and its work are available in English,⁷⁶ and a brief description will suffice here. In keeping with its dual function the Conseil is divided into administrative sections and the judicial section. The judicial section is divided into subsections, and normal business is handled by two subsections sitting together. Important cases come before larger bodies within the section.⁷⁷ The relative separation between administrative and judicial sections and the consequent development of a specialized tribunal have undoubtedly contributed to the Conseil's strength. The 1963 reform of the Conseil reduced this separation somewhat by increasing the interchanges between the two parts. In particular, the Plenary Assembly, which sits on important cases was effected; with an increased representation of the administration.⁷⁸ Nonetheless, most commentators feel the 1963 reforms have not

⁷¹ Von Mehren, Book Review, 102 U. Pa. L. Rev. 698, 699 (1954).

⁷² Von Mehren 186-92.

⁷³ Freedman, *The Conseil d'Etat in Modern France* 61-62 (1961) [hereinafter cited as Freedman]; Brewster, *The Reorganization of the French Administrative Courts*, 11 J. Pub. L. 236 (1962).

⁷⁴ See Freedman 113; Schwartz, *French Administrative Law and the Common Law World* 15-18 (1954) [hereinafter cited as Schwartz].

⁷⁵ Schwartz 61-62.

⁷⁶ E.g., Freedman; Hamson, *Executive Discretion and Judicial Control* (1954); Schwartz. Translations of cases and other materials on French administrative law can be found in von Mehren 138-336.

⁷⁷ See Schwartz 35-37.

⁷⁸ Drago, *Some Recent Reforms of the French Conseil d'Etat*, 13 Int'l & Comp. L.Q. 1282, 1296-97 (1964).

seriously effected the "judicial" nature of the *Section du Contentieux*.⁷⁹

Most members of the Conseil are chosen on the basis of their performance at the National Administration School, entrance to which is determined by examination. The remaining members are brought in after outstanding performance in careers within the administration. Once on the Conseil, advancement is by seniority only, thus eliminating any accusations of political favoritism, which have sometimes been levelled at the regular judiciary.⁸⁰ The independence of the Conseil has been further enhanced by a tradition of "de facto irremovability,"⁸¹ even though no law expressly guarantees that members cannot be removed. This tradition was broken in 1960 when the Government removed a junior member who had been serving with the administration in Algeria and was sharply critical of General De Gaulle's policy.⁸² The removal provoked "severe criticism,"⁸³ and the 1963 reform provided a series of lesser sanctions to meet such situations in the future. It is doubtful that any French Government would attempt to use the removal power to influence decisions of the judicial section.

The cases heard by the judicial section fall into two groups: *recours de pleine juridiction* and *recours pour excès de pouvoir*. The first are "proceedings to order the administration to take affirmative action, such as the payment of money damages."⁸⁴ The most important cases in this group are tort and contract claims in which the plaintiff seeks to hold the state liable.⁸⁵ The *recours pour excès de pouvoir* is the "proceeding to annul an *ultra vires* administrative act."⁸⁶ The Conseil may annul an administrative decision on one of several grounds, generally listed as "lack of authority (*incompétence*), failure to observe procedures required by law (*vice de forme*), abuse of power (*détournement de pouvoir*), and violation of the law (*violation de la loi*)." ⁸⁷ The development of the *recours pour excès de pouvoir* has been the outstanding feature of the Conseil's work. This remedy is the chief bulwark against arbitrary administrative action.

The *recours pour excès de pouvoir* is available against acts of the "administration," and it is essential to realize the breadth of application

⁷⁹ E.g., Vedel, *Droit administratif* 348 (3d ed. 1964); Silvera, *La réforme du Conseil d'Etat*, [1963] *S. Chron.* 51, 60. But cf. Drago, *supra* note 78, at 1295-97. For the circumstances which led to this reform see pp. 488-91 *infra*.

⁸⁰ See Williams & Harrison 256.

⁸¹ Drago, *supra* note 78, at 1288.

⁸² See *ibid.*; *Le Monde*, Nov. 10, 1960, p. 1, col. 4; *id.*, Nov. 11, 1960, p. 7, col. 3.

⁸³ Drago, *supra* note 78, at 1296-97.

⁸⁴ Schwartz 120.

⁸⁵ This group also includes certain election and taxation cases. Rivero, *Droit administratif* 188 (3d ed. 1965).

⁸⁶ Schwartz 120.

⁸⁷ Freedman 133.

of this term in France. The "administration" includes everything from local officials to the executive branch of the national government itself.⁸⁸ The Conseil has treated the Government as one more agency carrying out the legislature's will, and thus subject to review like other "administrative" agencies.⁸⁹ The fact that the Government obviously performs nonadministrative functions as well has led the Conseil to establish a category of nonreviewable acts, to be discussed below.⁹⁰ In addition, the Conseil has developed criteria of "standing," so that not every decision is automatically open to challenge.⁹¹

Among the "administrative" acts that the Conseil reviews is the exercise of the executive's general rule-making power (*pouvoir réglementaire*).⁹² The French executive branch has long possessed a rule-making power, independent of express legislative delegation, both to aid in the application of particular laws and to ensure in general the necessary minimum of order within the state.⁹³ Thus, for example, the President of the Third Republic could promulgate by decree a highway code by virtue of his inherent duty to maintain public order.⁹⁴ Since the middle of the nineteenth century the *Conseil d'Etat* has treated as reviewable these general regulations, usually entitled *Décrets*.⁹⁵

It has also been common for the Parliament to lay down general guidelines in an area and to "invite" the government to fill in the details.⁹⁶ When the government acts on this "invitation" it lays down the rules in a Regulation of Public Administration (*règlement d'administration publique*). During the nineteenth century there was some doubt whether these could be reviewed by the *Conseil d'Etat*. It was argued that they represented a delegation of the legislative power, and thus like any parliamentary law were beyond question by a court.⁹⁷ But in 1907 the *Conseil d'Etat* held that since *règlements d'administration publique* "emanate from an administrative authority" they are reviewable like other administrative acts.⁹⁸ The Conseil has also treated as reviewable the "decree-laws" of the Third Republic, and their Fourth Republic

⁸⁸ Waline, *Droit administratif* 4 (9th ed. 1963); Weil, *Le droit administratif* 6-7 (1964).

⁸⁹ Weil, *op. cit. supra* note 88, at 7-9.

⁹⁰ See pp. 485-86 *infra*.

⁹¹ Rivero, *op. cit. supra* note 85, at 216-17.

⁹² Vedel, *op. cit. supra* note 79, at 33.

⁹³ *Id.* at 12-15.

⁹⁴ Labonne, *Conseil d'Etat*, Aug. 8, 1919, [1919] *Recueil des arrêts du Conseil d'Etat* [hereinafter cited as C.E.] 737.

⁹⁵ Conclusions Tardieu in *Chemins de fer de l'Est*, *Conseil d'Etat*, Dec. 6, 1907, [1908] S. III. 1, 5, [1909] D. III. 57, 58.

⁹⁶ See Vedel, *op. cit. supra* note 79, at 155-58.

⁹⁷ See Tardieu, *op. cit. supra* note 95.

⁹⁸ *Compagnie des chemins de fer de l'Est*, *Conseil d'Etat*, Dec. 6, 1907, [1907] C.E. 913, [1909] D. III. 57, [1908] S. III. 1.

successors.⁹⁹ These took the form of grants by the legislature of "full powers" to the government to deal with a particular problem. Thus, although there is no judicial review of *legislation* in France, the *Conseil d'Etat* has established review of the general rules that the executive promulgates. Where the legislature had empowered the executive to act, as in the "decree-laws," the scope of review was narrow. The Conseil only considered whether the executive had stayed within the terms of the enabling law,¹⁰⁰ and it tended to construe these laws liberally.¹⁰¹ However, toward the end of the Fourth Republic there were indications that the Conseil would examine these administrative acts, as it examined all others, in the light of the "general principles of law."¹⁰²

Since 1945 the Conseil has, in effect, affirmed the existence of "great principles whose recognition as rules of law is indispensable to complete the judicial framework within which the nation must evolve."¹⁰³ These principles are of a higher order than the normal judge-made rules which govern the typical tort or contract case.¹⁰⁴ An example is the decision in *Société des concerts du conservatoire*.¹⁰⁵ Members of the plaintiff orchestra violated their contract, missing rehearsals in order to play in a concert given by the French National Radio orchestra. Plaintiff took disciplinary measures against them. The National Radio retaliated by ceasing to broadcast any of plaintiff's concerts, although it had done so in the past and continued to do so for other orchestras as a public service. The Conseil condemned this action and granted damages, primarily on the ground that the Radio "failed to observe the principle of equality which controls the functioning of public services."¹⁰⁶

This concern for equality has motivated the Conseil in its development of many of the "general principles of law." Thus the Conseil has insisted upon equal treatment for users of a public service,¹⁰⁷ for candidates at a state examination,¹⁰⁸ for state employees (*fonctionnaires*),¹⁰⁹ and also upon equality between the sexes.¹¹⁰ The Conseil's work in this

⁹⁹ Garrigou, Conseil d'Etat, March 6, 1956, [1956] C.E. 121, [1956] D.J. 253; Union des vehicules industriels, Conseil d'Etat, June 25, 1937, [1937] C.E. 619, [1937] D. III. 33, [1937] S. III. 97.

¹⁰⁰ Braibant & Fournier, *Chronique*, 1956 *Actualité Juridique* II. 220, 221.

¹⁰¹ Vedel, *op. cit. supra* note 79, at 185.

¹⁰² Garrigou, Conseil d'Etat, March 6, 1956, [1956] C.E. 121, [1956] D.J. 253.

¹⁰³ Letourneur, Les "principes généraux du droit" dans la jurisprudence du Conseil d'Etat, 5 *Etudes et documents* 19 (1951).

¹⁰⁴ See Rivero, *op. cit. supra* note 85, at 70-71. These principles are most frequently applied in recours pour excès de pouvoir.

¹⁰⁵ Conseil d'Etat, March 9, 1951, [1951] C.E. 151, [1951] S. III. 81.

¹⁰⁶ Damages appear to have been nominal.

¹⁰⁷ Société du journal "L'Aurore", Conseil d'Etat, June 25, 1948, [1948] C.E. 289, [1948] D.J. 437, [1948] S. III. 69.

¹⁰⁸ Beaufort, Conseil d'Etat, Oct. 19, 1960, [1960] C.E. 545.

¹⁰⁹ Aurnage, Conseil d'Etat, Jan. 5, 1962, [1962] C.E. 9.

¹¹⁰ Demoiselle Bobard, Conseil d'Etat, July 3, 1936, [1936] C.E. 721, [1937] D. III. 38.

area resembles in many ways the Supreme Court's development of the equal protection clause, employing such concepts as "reasonable classification."¹¹¹ The Conseil has developed other "general principles" in a manner which resembles the Supreme Court's handling of the due process clause.¹¹² These include the principle of nonretroactivity of administrative acts,¹¹³ the principle of freedom of commerce and industry,¹¹⁴ and the development of procedural guarantees in administrative hearings.¹¹⁵

There has been considerable dispute among French legal scholars over the sources and the exact nature of the "general principles of law." Much like common law judges who "found" a preexisting law, the Conseil "affirms the existence"¹¹⁶ of principles independent of the judge's will. At times the Conseil has indicated that the Preamble of the 1946 Constitution, reaffirmed by the 1958 Constitution, is the source of a particular "general principle."¹¹⁷ However, there have been many cases in which the Conseil has not indicated any source.¹¹⁸ Thus it has been argued that the Conseil infers the "general principles of law" from the totality of the laws and institutions¹¹⁹ or from the constitutional custom of the country.¹²⁰ Some have been unwilling to admit the independent role which the Conseil plays in developing these principles.¹²¹ But it is clear that "the judge's discovery is, in reality, largely a creative one: in affirming the existence of a principle, he gives it the sanction which it previously lacked, and thus places it among the rules of positive law."¹²²

Before 1958 there was also debate over the exact place of the "general principles" within the hierarchy of laws. Most commentators said they had the same force as statutes.¹²³ Thus they were binding on the executive, always subordinate to *La Loi*, but not on Parliament. However, the Conseil itself had indicated it considered the "general principles" of supra-legislative or constitutional dimensions. In the famous *Lamotte*

¹¹¹ See Conseil national de l'ordre des médecins, Conseil d'Etat, July 13, 1962, [1962] C.E. 479.

¹¹² Schwartz 211-16.

¹¹³ E.g., Ville de Lyon, Conseil d'Etat, May 5, 1962, [1962] C.E. 294.

¹¹⁴ See Mouvement français pour l'abondance, Conseil d'Etat, Nov. 6, 1959, [1959] C.E. 580.

¹¹⁵ E.g., Dame Veuve Trompier-Gravier, Conseil d'Etat, May 5, 1944, [1944] C.E. 133, [1945] D.J. 110, [1945] S. III. 14.

¹¹⁶ Rivero, *op. cit. supra* note 85, at 70.

¹¹⁷ Confédération nationale des Associations de sinistrés, Conseil d'Etat, March 7, 1958, [1958] C.E. 152.

¹¹⁸ E.g., Société des concerts du Conservatoire, Conseil d'Etat, March 9, 1951, [1951] C.E. 151.

¹¹⁹ Batailler 122-23.

¹²⁰ Vedel, *op. cit. supra* note 79, at 203.

¹²¹ See Letourneur, *supra* note 103, at 29.

¹²² Rivero, *op. cit. supra* note 85, at 71.

¹²³ E.g., Letourneur, *supra* note 103.

case, the Conseil "interpreted" a statute contrary to the legislature's clear intention in order to prevent the statute from infringing a general principle.¹²⁴ The Conseil has consistently assumed that the legislature does not wish to violate the "general principles of law" and has interpreted statutes in accordance with this presumption.¹²⁵

The exact nature of the general principles had little impact on the Conseil's ability to make administrative actions conform to them, because the executive was subordinate both to the laws and to the Constitution. The constitutional revolution of 1958 threatened to change this situation by freeing the executive from its subordination to Parliament. Indeed, "De Gaulle's Republic" posed many important problems for the *Conseil d'Etat*, and in order to appreciate them it is necessary to consider the 1958 changes in some detail.

THE NEW REPUBLIC

A. *Origins*

The Fifth Republic dramatically changed the dynamics of French institutions. The immediate cause of the Fourth Republic's downfall was the Government's inability to deal with a revolt of the French army and settlers in Algeria. Despite the formation of a solid government under Pierre Pflimlin the total breakdown of the state was evident. "Monsieur Pflimlin's Minister of War had no army; his Minister of the Interior had no police; and his Minister for Algeria could not even go there since he would have been arrested on the spot."¹²⁶

This breakdown was not a new phenomenon but a brutal demonstration of the fact that "the French state had been withering away for years."¹²⁷ Ministerial instability, for many years the main handicap of French parliaments, became intolerable during the Fourth Republic.¹²⁸ A deeply divided nation elected an equally divided Parliament,¹²⁹ in which the large block of Communist deputies automatically voted against every government. Indeed the internal schisms prevented any "consensus of the citizens to accept the existing institutions as the normal framework in which to deal with their differences."¹³⁰ Despite its weaknesses the

¹²⁴ *Ministre de l'agriculture v. Lamotte*, Conseil d'Etat, Feb. 17, 1950, [1950] C.E. 110, [1950] D.J. 282, [1950] S. III. 65.

¹²⁵ Batailler 130-31.

¹²⁶ Werth, *De Gaulle, A Political Biography* 236 (1965) [hereinafter cited as Werth]. The quote is a paraphrase of M. Pflimlin's remarks at his last cabinet meeting. Williams & Harrison 68.

¹²⁷ Williams & Harrison 67.

¹²⁸ See Drago, *General Comparative View of the French Constitution*, 21 *Ohio St. L.J.* 535, 537 (1960). For a list of the twenty-five different governments of the Fourth Republic see Fauvet, *La IV^e République*, Annexe 3 (1959).

¹²⁹ Williams & Harrison 121.

¹³⁰ Grosser, *The Evolution of European Parliaments*, Daedalus, Winter 1964, p. 153.

Fourth Republic might have survived—economically France was sound—had it not had to face the political and moral problems of the loss of empire. The inability to resolve the Algerian crisis caused the final collapse.¹³¹

While the Republic crumbled, De Gaulle and the Gaullists maneuvered, and with consummate skill “he stepped resolutely into a vacant place.”¹³² His supporters in Algeria had satisfied the Right that De Gaulle would carry out its program. Most of the liberals and moderates in France saw him as the only acceptable alternative to civil war. (Guy Mollet summed up their position as “always avoid civil war—especially when you are sure to lose.”)¹³³ The result was virtually *carte blanche*, an unparalleled opportunity for De Gaulle and his chief constitutional architect Michel Debré to establish in France the institutions they had long considered necessary. Both De Gaulle and Debré had been concerned over the endemic weakness of French governments and were resolved to restore what Debré called the “authority” of the state.¹³⁴ Although their views diverged on some points, particularly in regard to the role of Parliament, both emphasized the need for strong executive leadership.¹³⁵ The result of their efforts is a curious hybrid, both “presidential and parliamentary.”¹³⁶

B. Institutions

The Fifth Republic institutes a dual executive composed of the President of the Republic and of the Government (Cabinet), presided over by the Prime Minister. Each one possesses significant powers (a situation which in the future may lead to conflicts between them).¹³⁷ The President was originally chosen by an electoral college of eighty thousand “notables.” In 1962 this was changed to universal suffrage. The President has significant powers which his predecessors did not. Chief among these are the unrestricted power to dissolve Parliament (article 12);¹³⁸ the power to institute a referendum (article 11);¹³⁹ and complete, indeed dictatorial, authority during a national emergency of whose existence he is the sole judge (article 16).¹⁴⁰ The

¹³¹ Duverger, *La Cinquième République* 1 (3d ed. 1963).

¹³² Taylor, *Fabulous Monster*, *The New York Review of Books*, May 12, 1966, p. 17.

¹³³ Williams & Harrison 69.

¹³⁴ Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 *Harv. L. Rev.* 801, 815 (1960).

¹³⁵ *Ibid.*

¹³⁶ Chapsal, *La Cinquième République* 80 (*Les Cours de Droit* 1962-63).

¹³⁷ Duverger, *op. cit. supra* note 131, at 35-36.

¹³⁸ See *id.* at 44-45.

¹³⁹ In this, however, he must have the co-operation of the Government or of Parliament.

¹⁴⁰ He may invoke his powers “when the institutions of the Republic, the inde-

text of the Constitution appears to create a President along the lines De Gaulle had advocated: an "arbiter," above the parties and the day to day political process, capable of intervening forcefully when that process breaks down.¹⁴¹

The normal executive power is exercised by the Government under the direction of the Prime Minister. Article 20 declares: "the Government determines and conducts the Nation's policy." The President names the Prime Minister who then forms a Government. Unlike the Fourth Republic, deputies who become cabinet members must resign their seats (article 23). The Government is responsible before Parliament, but the new Constitution makes it relatively difficult for Parliament to bring a Government down.¹⁴² The Government exercises its power by virtue of the *pouvoir réglementaire*, that is, the authority to enact decrees and ordinances. The Government may, as before, enact decrees to implement laws. More importantly, the new Constitution limits Parliament's power to certain matters; all other areas are ruled by the "*pouvoir réglementaire*."

Articles 34, restricting Parliament's jurisdiction to certain specified matters, is a radical break from French constitutional tradition. Not only are these matters (the *domaine de la loi*) explicitly spelled out; article 37 states that all other matters belong to the Government's *pouvoir réglementaire*. And, as noted above, the *Conseil Constitutionnel* has tended to interpret these two articles in favor of the Government's power.¹⁴³ The extent of the change should not be overstated.¹⁴⁴ The domain of article 34 is not narrow,¹⁴⁵ and there is some possibility of Parliament's widening its jurisdiction.¹⁴⁶ Nonetheless, it is significant that in many areas a once omnipotent Parliament can no longer act. The short sessions (article 28) and the Government's extensive powers in debates (article 44) are further examples of the lesser role of Parliament.

The Government, on the other hand, may be able to enter Parliament's

pendence of the Nation, the integrity of its territory, or the execution of its international engagements are seriously and immediately threatened. . . ." He must first "consult" the Prime Minister, the presidents of the two chambers, and the *Conseil Constitutionnel*.

¹⁴¹ Drago, *supra* note 128, at 548-49.

¹⁴² Duverger *op. cit.* *supra* note 131, at 149-50.

¹⁴³ See p. 469 *supra*.

¹⁴⁴ See Tunc, *The Fifth Republic, the Legislative Power, and Constitutional Review*, 9 *Am. J. Comp. L.* 335, 337-39 (1960).

¹⁴⁵ Statutes govern such matters as civil liberties, military obligations, nationality, status of persons, criminal law and procedure, levying of taxes and issuing of currency, and nationalization of industry. These are other areas in which the legislature can only lay down general principles. These include, among others, the organization of the national defense, local government, the law of obligations, and labor and social security matters.

¹⁴⁶ Drago, *supra* note 128, at 544.

domain. Article 38 provides that Parliament can grant the Government, "for the execution of its program" and "for a limited time," the power to enact ordinances (*ordonnances*) covering matters in the domain of the law. This is essentially a constitutional recognition of the prior practice of decree-laws.¹⁴⁷ Ratification by Parliament of the Government's actions is necessary, but the Government need only *introduce* a ratification bill to satisfy this requirement.¹⁴⁸

C. *The Evolution of the Fifth Republic*

When the new Constitution was enacted observers were divided as to whether it represented a major change in the structure of French government.¹⁴⁹ Events since 1958 have borne out those who said that it did. Parliament has played an unimportant role throughout the Fifth Republic, and the President has become increasingly predominant within the executive branch.

All observers agree that Parliament has played a secondary role.¹⁵⁰ It has not been the significant forum for national issues which Debré had hoped,¹⁵¹ and most important decisions have come from the executive. Only once has Parliament seriously challenged General De Gaulle. In 1962 the Government was overthrown on a motion censuring De Gaulle's decision to amend the Constitution by a direct referendum which by-passed Parliament.¹⁵² De Gaulle thereupon dissolved Parliament and won a decisive victory in the ensuing election.

It was evident from the outset that General De Gaulle's personality would be an important factor in the evolution of the Fifth Republic. In effect, he has increased the power of his office far beyond what the Constitution intended.¹⁵³ As early as 1959 the President of the Assembly informed the Gaullist party congress of a "reserved domain" in which the President would exercise sole power.¹⁵⁴ This included defense, diplomacy, and Algeria. Reading the Constitution, one would think that these matters belong to the Government which "determines and conducts the policy of the nation" (article 20). The substitution of M. Pompidou for M. Debré in 1962 has made the Government even less of an independent policy making organ than it was before.¹⁵⁵

¹⁴⁷ Duverger, *op. cit. supra* note 131, at 73.

¹⁴⁸ See *id.* at 74.

¹⁴⁹ Compare Drago, *supra* note 128, with Duverger, *op. cit. supra* note 131, at 16-24.

¹⁵⁰ E.g., Chapsal, *op. cit. supra* note 136, at 77-78; Viansson-Ponté, *Prélude à la campagne*, *Le Monde*, July 8, 1966, p. 7, col. 2.

¹⁵¹ For Debré's goals, see Williams & Harrison 148.

¹⁵² A decision of questionable constitutionality, see Chapsal, *op. cit. supra* note 136, at 183-84.

¹⁵³ Duverger, *op. cit. supra* note 131, at 14, 17-18.

¹⁵⁴ *Id.* at 86.

¹⁵⁵ Chapsal, *op. cit. supra* note 136, at 172-73.

The dominant aspect of the Fifth Republic, both in its institutions and in its evolution, is the primacy of the executive. Inevitably, this change raised the question whether the *Conseil d'Etat* could continue to act as "censor of the executive branch." The great bulk of the Conseil's work—torts, contracts, and disputes involving administrative acts—would not be affected. But one might wonder how great a control it could exercise over the Government, particularly when that Government was dominated by a monarchical figure who believed that governmental power should be exercised free from "the frowning disapproval of lawyers."¹⁵⁶

THE CONSEIL D'ETAT AND THE FIFTH REPUBLIC¹⁵⁷

A. Control over the Government

(1) Article 37

Perhaps the most important question was whether the Conseil could review the Government's decrees when it exercised its autonomous rule-making power (*pouvoir réglementaire autonome*) under article 37. Many commentators assumed that the Conseil could do so,¹⁵⁸ and there was evidence that the drafters of the Constitution had assumed that it would.¹⁵⁹ Nonetheless, the issue was not free from doubt,¹⁶⁰ and a strong argument against review could be made. The Constitution gave the Government normative power that had formerly belonged to the legislature (article 37). And not only was the Government now doing the same sort of thing the legislature did; in its domain it was free from any interference by Parliament. Did this not mean that the Government in its rule-making domain was as sovereign as the legislature in the *domaine de la loi*?¹⁶¹ An authority which "determines and conducts the policy of the nation" is something more than part of the "administration." Would it not be inconsistent with the spirit of the Constitution for the *Conseil d'Etat* to review the *pouvoir réglementaire autonome*?¹⁶² The Conseil's decision in *Syndicat général des ingénieurs-conseils*¹⁶³ answered this question in a manner worthy of Chief Justice Marshall.

The 1946 Constitution gave the Prime Minister full law-making au-

¹⁵⁶ Quoted in Drago, *supra* note 128, at 556.

¹⁵⁷ See Weil, *The Strength and Weaknesses of French Administrative Law*, 1965 *Camb. L.J.* 242, 248-51.

¹⁵⁸ E.g., Tunc, *supra* note 144, at 343.

¹⁵⁹ See Burdeau, *Droit constitutionnel et institutions politiques* 539 (1965).

¹⁶⁰ See De Soto, *La Loi and le règlement dans la Constitution du 4 octobre, 1958*, 1959 *Revue de droit public*, 240, 292.

¹⁶¹ Vedel, *Droit administratif* 38 (3d ed. 1964).

¹⁶² *Ibid.*

¹⁶³ *Conseil d'Etat*, June 26, 1959, [1959] C.E. 394, [1959] D.J. 541, [1959] S.J. 202.

thority in the colonies during a transition period.¹⁶⁴ Under this power he had issued a decree in 1947 regulating the architectural profession in the colonies. This decree gave a virtual monopoly to those who had an architect's diploma. In metropolitan France "technical engineers" could design industrial and commercial buildings but not houses. Under the decree only architects could design any building in the colonies. In 1959 a request by the engineers to annul the decree came before the Conseil. For a number of reasons the matter had lost all practical importance. Although the decree had been published in the *Journal Officiel*, it had never been promulgated or applied in the colonies. Furthermore, the Minister for Overseas France had announced that he did not intend to apply it. More basically, there was virtually no place in which it could have been applied. The colonies of 1947 had either become independent states or "overseas territories" which, under French law, had the power to regulate the professions. The only possible place of application was the islands of Saint-Pierre and Miquelon, an area in which the volume of architectural business is slight.¹⁶⁵ Nonetheless, the Conseil heard the case. It concluded that the decree was valid in that there was no violation of the general principle of freedom of commerce and industry.¹⁶⁶

The case is important because the Prime Minister in 1947 was exercising an autonomous rule-making power very similar to that granted in the new Constitution's article 37.¹⁶⁷ In his "conclusions" on the case, the Government Commissioner (*Commissaire du gouvernement*) stressed this similarity and argued that decrees promulgated under either power should be reviewable.¹⁶⁸ The Conseil's laconic holding shows clearly an acceptance of this position. It held that the Prime Minister had been obliged to respect "the general principles of law which are binding on all rule-making authorities" ("*les principes généraux du droit qui . . . s'imposent à toute autorité réglementaire*"). As later cases have made clear, the reference to "*toute autorité réglementaire*" included article 37 decrees.¹⁶⁹ The significance of the holding was immediately recognized, and the commentators approved, chiefly on the ground that an absence

¹⁶⁴ Constitution of 1946, arts. 47, 104.

¹⁶⁵ In 1950 the population of the two islands was 4,606. *Encyclopedia Britannica* 853 (1961).

¹⁶⁶ The facts are taken from the "conclusions" of the *Commissaire du gouvernement* M. Fournier, 1959 *Revue de droit public* 1004.

¹⁶⁷ Drago, Note to *Syndicat général des ingénieurs-conseils*, [1959] S.J. 203.

¹⁶⁸ 1959 *Revue de droit public* 1010. The *Commissaire du gouvernement* is a member of the Conseil who presents an independent view of the case at bar. In his arguments ("conclusions") he reviews the authorities and gives the members of the tribunal his view as to the proper decision. For a description of the *Commissaire*, see Schwartz 138-39.

¹⁶⁹ E.g., *Société Eky*, Conseil d'Etat, Feb. 12, 1960, [1960] C.E. 101, [1960] D.J. 263, [1960] S.J. 131.

of any review would have left the citizens without safeguards against governmental actions.¹⁷⁰

The case not only established the reviewability of article 37 decrees, but, of equal importance, it held that they could not violate the "general principles of law." The Conseil thus appears to have answered in the negative the question whether these principles are of legislative force. For since the Government's *pouvoir réglementaire autonome* is free from any control by Parliamentary statutes, it would seem that "principles" having the hierarchical value of statutes could not control the exercise of this power.¹⁷¹ Most French jurists treat the case as establishing the "constitutional or 'quasi-constitutional' value of the 'general principles of law.'" ¹⁷²

This "promotion" of the general principles¹⁷³ has raised again the question of their source. In view of the "constitutional" nature of the "general principles," should not this category be limited to those principles which are enunciated in constitutional texts?¹⁷⁴ Most of the general principles can be found in the 1946 Preamble and the Declaration of the Rights of Man. In 1960 the Conseil indicated that it considered these documents as part of the applicable positive law.¹⁷⁵ Thus it can be argued that the term "general principles of law" is now only a synonym for the rules of the Preamble and the Declaration, and that the Conseil had previously used the term because it was not willing to recognize that these documents had the force of positive law.¹⁷⁶ The difficulty with this argument is that some of the important "general principles" are not found in either document. These include the principle of nonretroactivity of administrative acts, the rights of parties in administrative proceedings, and the availability of review of administrative acts.¹⁷⁷ Some jurists have resolved this problem by reasoning that while these principles are not *directly* found in the texts, they are the "indispensable consequence" of what is in the texts.¹⁷⁸ (The formula is "posed by the [texts] or deduced by the judge from these declarations.")¹⁷⁹

¹⁷⁰ E.g., Chapus, *De la soumission au droit des règlements autonomes*, [1960] D. Chron. 119.

¹⁷¹ Drago, *supra* note 167, at 204-05; Fournier, *supra* note 166, at 1011-12.

¹⁷² Batailler 132. *Contra*, Chapus, *supra* note 170, at 124.

¹⁷³ Braibant, *L'arrêt "Syndicat général des ingénieurs-conseils" et la théorie des principes généraux du droit*, 16 *Etudes et documents* 67, 68 (1962).

¹⁷⁴ See Rivero, *Droit administratif* 72 (3d ed. 1965).

¹⁷⁵ *Société Eky*, Conseil d'Etat, Feb. 12, 1960, [1960] C.E. 101, [1960] D.J. 263, [1960] S.J. 131.

¹⁷⁶ Cf. Batailler 139-40.

¹⁷⁷ Chapus, *supra* note 170, at 122-23.

¹⁷⁸ Fournier, *supra* note 166, at 1012; see Batailler 138-39.

¹⁷⁹ Fournier, *supra* note 166, at 1013.

It has also been argued that the Conseil infers the general principles from constitutional "custom" as well as from constitutional texts.¹⁸⁰

The Conseil's language in subsequent cases does not answer the question. In one case it referred to the "principles recalled in the preamble of the Constitution of 1946, to which the Constitution of October 4, 1958 refers. . . ."¹⁸¹ Yet in other cases involving the "general principles" it has either merely cited the Constitution in the list of authorities¹⁸² or not cited it at all.¹⁸³ Perhaps the precise answer to this doctrinal controversy is of secondary importance. The essential point is that "*les principes généraux du droit*" constitute an effective body of rules which the Conseil uses and develops in its review of the Government's "laws." Since 1959 the Conseil has reviewed numerous decrees and has invalidated some for violating the general principles.¹⁸⁴ It has, however, been criticized for timidity in this review.¹⁸⁵ Yet such criticism should not obscure the importance of the establishment of judicial review of article 37 decrees.

(2) Article 38

Once the *Conseil d'Etat* had decided that the *pouvoir réglementaire* of article 37 was subject to its review, it seemed only a short step to treat the ordinances of article 38 as equally reviewable. Though given the more imposing, monarchical title of "ordinances" these too come from the government. Such a solution seemed natural in view of the fact that article 38 is primarily a recognition of the prior practice of "decree-laws" which the Conseil had reviewed.¹⁸⁶ Indeed, Debré himself had made the analogy in a parliamentary debate.¹⁸⁷ And while article 38 speaks of "measures," article 92—which gave the Government power to enact ordinances during the first four months of the new Republic—spoke of "legislative measures with the force of law."¹⁸⁸ Nonetheless some writers argued that executive law-making under article 38 was not reviewable even if that under article 37 was.¹⁸⁹ This reasoning was

¹⁸⁰ Vedel, *op. cit. supra* note 161, at 203.

¹⁸¹ Syndicat chrétien de l'administration pénitentiaire, Conseil d'Etat, Dec. 6, 1963, [1963] C.E. 607.

¹⁸² Société de pétroles Shell-Berre et autres, Conseil d'Etat, June 19, 1964, [1964] C.E. 344.

¹⁸³ D'Oriano, Conseil d'Etat, Oct. 23, 1964, [1964] C.E. 486, 1965 *Revue de droit public* 282 (conclusions Bertrand).

¹⁸⁴ D'Oriano, *supra* note 183; Jourde & Maleville, Conseil d'Etat, Sept. 28, 1962, [1962] C.E. 508.

¹⁸⁵ L'huillier, Note to Société Eky, [1960] D.J. 263, 264.

¹⁸⁶ Debbasch, Les ordonnances de l'article 38 dans la Constitution du 4 octobre 1958, [1964] *Semaine Juridique* 1701, § 7.

¹⁸⁷ *Journal Officiel*, Debates, Senate, Feb. 3, 1960, p. 37.

¹⁸⁸ These were held immune from review by the Conseil in Société Eky, Conseil d'Etat, Feb. 12, 1960, [1960] C.E. 101, [1960] D.J. 263, [1960] S.J. 131.

¹⁸⁹ E.g., De Soto, *supra* note 160, at 287-88.

apparently based on the new Constitution's rigid distinction between the "domain of the law" (article 34) and the "domain of the *règlement*" (article 37). Whatever was in the law's domain would have the law's immunity regardless of who the author was.¹⁹⁰

The Conseil settled the matter in 1961 by reviewing and invalidating an article 38 "ordinance."¹⁹¹ The law of February 4, 1960, passed during a critical time in Algeria, authorized the Government to take "measures normally in the domain of the law and necessary to assure the maintenance of order." One article of the ordinance in question determined who were to be the representatives of the police on a certain commission. It declared that those chosen at an earlier election would continue to serve. In fact, this election had been hotly disputed, and a challenge in the administrative courts was likely. Thus the ordinance would have the effect of foreclosing the normally available review. But the availability of review of administrative acts is a "general principle of law." The Conseil held that the Government had not been granted "the power to withdraw certain administrative acts from any judicial control by declaring them valid." Thus article 38 ordinances, like article 37 decrees, must conform to the "general principles of law."¹⁹² It is also generally assumed that the Conseil will examine article 38 ordinances to determine whether the Government has gone beyond the terms of the enabling act and exercised a legislative power broader than that granted.¹⁹³

When article 38 is in question there is an important limitation to the Conseil's power of review, not present in article 37 situations. The executive cannot violate the "general principles of law," but the legislature can. Thus it would seem that Parliament could authorize the Government to violate the general principles while promulgating ordinances in the domain of the law, since the executive would be acting "under cover" of the law.¹⁹⁴ This was, in effect, the solution the Conseil appeared to have reached with respect to the "decree-laws" under the Fourth Republic. In the famous *Garrigou* case¹⁹⁵ the Conseil presumed that Parliament had not wanted the Government to violate the general principle of nonretroactivity. Thus the tribunal invalidated a retroactive tax increase. This decision would seem to establish that unless an enabling act specifically authorized the Government to derogate from the general principles, the Conseil would invalidate any such deviation.

¹⁹⁰ Debbasch, *supra* note 186, at § 7.

¹⁹¹ Fédération nationale des syndicats de police, Conseil d'Etat, Nov. 24, 1961, [1961] C.E. 658, [1962] D.J. 424.

¹⁹² Fromont, note to Fédération nationale des syndicats de police, [1962] D.J. 425-26.

¹⁹³ Debbasch, *supra* note 186, at § 26.

¹⁹⁴ *Id.* at § 32.

¹⁹⁵ Conseil d'Etat, March 16, 1956, [1956] C.E. 121, [1956] D.J. 253.

However, two years later the Conseil *implied* such an authorization, relying apparently on the breadth of the enabling act and the emergency situation in Algeria.¹⁹⁶

The 1961 decision is more in harmony with the *Garrigou* approach.¹⁹⁷ The presumption that Parliament does not want the Government to violate the "general principles" would merely be an application of the Conseil's general method of "interpreting" statutes, i.e. the presumption that Parliament itself does not wish to violate these principles.¹⁹⁸

Nonetheless, it has been argued that the Conseil will take a case by case approach with article 38, and that it will examine the breadth of the enabling act to determine from its "spirit" whether permission to violate the general principles is implied.¹⁹⁹

B. Control over the President

(1) Article 16

Article 38 is really an example of joint law-making by the President and the Government. The latter draws up the ordinances, but they must be signed by the President, which also gives him the power not to sign.²⁰⁰ In other cases, the President acts alone as law-maker. The most famous is article 16 of the Constitution, dealing with national emergencies. When the President has decided to apply it and has gone through the proper formalities,²⁰¹ he may take "measures required by the circumstances" in order to "restore to the public powers, in the least possible delay, the means of accomplishing their mission" (article 16). In the early years of the Fifth Republic the question whether the *Conseil d'Etat* could review these measures was the subject of much debate.

There were some who argued the situation was similar to article 38. The President is temporarily empowered to act in the domain of the law, but he remains an executive authority whose acts are subject to review before the Conseil.²⁰² An analogy from prior case law was invoked. Under the Third and Fourth Republics the Conseil had held that in "exceptional circumstances" the Government could deal with legislative matters without a prior authorization and could disregard laws.²⁰³ All acts were subject to review by the Conseil, but a very lenient standard

¹⁹⁶ Syndicat des propriétaires de forêts de chênes-lièges d'Algérie, Conseil d'Etat, Feb. 7, 1958, [1958] C.E. 74.

¹⁹⁷ Silvera, Variations sur le thème des ordonnances, [1963] Dalloz, Bulletin législatif, chronique 149, 160.

¹⁹⁸ See text at notes 124-25 supra.

¹⁹⁹ Debbasch, supra note 186, at § 32.

²⁰⁰ Duverger, La Cinquième République 74-75 (3d ed. 1963).

²⁰¹ See note 140 supra.

²⁰² See Vedel, op. cit. supra note 161, at 26.

²⁰³ Rivero, op. cit. supra note 174, at 78-82; Waline, Droit administratif 653-57 (9th ed. 1963).

was applied in view of the "exceptional circumstances." Thus article 16 could be viewed as merely institutionalizing this case law.²⁰⁴

The argument that article 16 measures are reviewable is open to serious criticism. To begin with, the analogy to article 38 is not convincing, since, under that article, the Government's ordinances must be ratified, expressly or impliedly, by Parliament. There is no such requirement in the case of article 16.²⁰⁵ More importantly, the argument for reviewability ignores the basic transformation of the executive, and particularly of the Presidency, under the new Constitution. Prior to 1962 most of the leading French jurists were in fact maintaining that there could be no review of article 16 measures.²⁰⁶ There were two grounds for this position. The first invoked the spirit of the Constitution, stressing the new importance of the President.²⁰⁷ Article 5 declares that he "safeguards the respect of the Constitution. He ensures, through his arbitration, the regular functioning of the public powers and the continuity of the state. He is the guarantor of national independence, the integrity of the territory, and of the respect of the Community agreements and of treaties." And article 16 is the application of the concepts expressed in article 5; when the other powers are incapable of acting or of imposing their will, the President steps in to fill the vacuum. He becomes at that moment the incarnation of national sovereignty.²⁰⁸ Thus review of his actions would be contrary to the tradition of the supremacy of the general will.

The second argument against any review is drawn from one of the developments of prior case law, the act of government (*acte de gouvernement*). Under the Third and Fourth Republics the Conseil had considered the President and the Government as executive or administrative authorities subject to review by it. Yet there were certain actions that it refused to review. The jurists grouped these matters under the heading of *acte de gouvernement*, although the Conseil itself never used this term in a decision until 1962.²⁰⁹

La doctrine could never agree on how to determine what was an *acte de gouvernement*,²¹⁰ and the Conseil was not much help. It was generally agreed the cases could be grouped under the following headings:

"1. Acts of the executive in its relations with the legislature;

²⁰⁴ See Lamarque, *Légalité constitutionnelle et contrôle juridictionnel des actes pris en vertu de l'article 16*, [1962] *Semaine Juridique* § 1711.

²⁰⁵ *Ibid.*

²⁰⁶ E.g., Rivero, *op. cit. supra* note 174, at 63-64; Vedel, *op. cit. supra* note 161, at 26-27.

²⁰⁷ See Lamarque, *supra* note 204.

²⁰⁸ See Galabert & Gentot, note on Rubin de Servens, [1962] *Actualité Juridique* 214, 215.

²⁰⁹ Berlia, note to Rubin de Servens, 1962 *Revue de droit public* 288-89.

²¹⁰ See Vedel, *op. cit. supra* note 161, at 220-25.

2. Acts involving the relations of the French government with a foreign power. . . .;

3. Certain acts related to the conduct of war and national defenses."²¹¹ Perhaps it is best to see in the concept of *acte de gouvernement* a recognition by the Conseil that the executive, even under prior Republics, really was more than just part of the administration. At times it performed an administrative function, but at other times it performed a governmental function. The *acte de gouvernement* can thus be reviewed as an attempt to separate out "governmental" matters which it is inappropriate for an "administrative" court to review.²¹²

It was argued that the *acte de gouvernement* cases applied to article 16.²¹³ The invocation of this article certainly involves the relations between the President and the other powers of government since he, to some extent, replaces them. And perhaps the institution of a "temporary dictatorship"²¹⁴ is not something a court can do much about. Might it not be wiser to leave the matter to Parliament, which could impeach the President for treason or take other measures?²¹⁵

On April 3, 1961, faced with a revolt of the French Army in Algeria, De Gaulle invoked article 16.²¹⁶ Among the measures he took was the creation of a special military court to judge those connected with crimes against "the security of the state and the discipline of the Army, committed in connection with the events of Algiers." Defendants before that court brought a *recours pour excès de pouvoir* to annul the decision creating it. They argued that the circumstances had not justified invoking article 16. In addition they attacked the new court itself, on two grounds drawn from the general principles of law. The first ground was that the investigation leading to indictment (*l'instruction*) was not in the hands of a judge. The second ground was one of nonretroactivity; the special tribunal could judge offenses committed before the date of its establishment.

In *Rubin de Servens*²¹⁷ the Conseil first held that the decision to invoke article 16 and decisions as to its duration were *actes de gouvernement* which it would not consider. As to the *measures* taken under article 16, the Conseil held that it would review those which fell in the *domaine réglementaire* of article 37 but not those in the article 34 domain

²¹¹ Schwartz 160-61.

²¹² Batailler 231-32.

²¹³ Vedel, *Droit administratif* 27 (2d ed. 1961).

²¹⁴ *Ibid.*

²¹⁵ See Henry, conclusions to *Rubin de Servens*, 1962 *Revue de droit public* 294, 303.

²¹⁶ See Pickles, *Article 16 in Practice*, 1963 *Pub. L.* 23.

²¹⁷ *Conseil d'Etat*, March 2, 1962, [1962] *C.E.* 143, [1962] *D.J.* 307, [1962] *S.J.* 147.

of the law. Since the creation of new courts is one of the subjects listed in article 34, the measure in question "which bears on legislative matters —presents the character of a legislative act which the administrative judge cannot review."

The *commissaire du gouvernement*, who argued for this result, based his reasoning primarily on historical grounds. In the past, when one authority had held both the legislative and the executive authority, e.g., the Vichy Government and the Liberation Government, the Conseil had distinguished between measures of an "administrative" and of a "legislative" character, reviewing only the former.²¹⁸ The *commissaire* also stressed that the general principles of French public law demand some control of executive acts.²¹⁹ Undoubtedly the Conseil wished to preserve a partial control in article 16 situations.

Yet it is doubtful that this control will be very effective.²²⁰ Most of the measures which seriously affect individual liberties will probably fall in the domain of the law and thus be immune from review.²²¹ (In examining the implementation of these measures by lower officials the Conseil will probably assume that the President did not wish to violate the general principles of law.)²²² Even when a matter is deemed "administrative" the Conseil will undoubtedly allow the President great leeway in view of the "exceptional circumstances."²²³ The Conseil will not directly question the wisdom of invoking article 16, and it will probably not do so indirectly by deeming particular measures unjustified.²²⁴

Some control is no doubt better than none at all. Yet it is by no means certain that the Conseil will again exercise even the limited control established by *Rubin de Servens*. Since 1965 the President is elected by universal suffrage. Since he is now, like Parliament, a direct representative of the general will, it would seem that all of his decisions should benefit from the same immunity.²²⁵ The whole question of review of presidential law-making would be somewhat academic if article 16 were the only example of it, since recourse to that article is likely to be extremely rare. But General De Gaulle has discovered in the resources of the Constitution another basis for presidential law-making: the enabling referendum.

²¹⁸ Henry, *supra* note 215, at 310-12.

²¹⁹ *Id.* at 308.

²²⁰ Berlia, *supra* note 209, at 292-93.

²²¹ Lamarque, *supra* note 204. See *Ministre de l'Intérieur v. Herbert*, Conseil d'Etat, Oct. 22, 1965, [1965] C.E. — (measure under article 16 restrictive of individual liberty held within legislative domain).

²²² See D'Oriano, Conseil d'Etat, Oct. 23, 1964, [1964] C.E. 486, 1965 *Revue de droit public* 282 (conclusions Bertrand).

²²³ This is the solution for which the *Commissaire du Gouvernement* argued in *Rubin de Servens*. 1962 *Revue de droit public* at 308.

²²⁴ Cf. Vedel, *op. cit.* *supra* note 213, at 27.

²²⁵ Batailler 521-22.

(2) Ordinances promulgated by virtue of a referendum

The Constitution of the Fifth Republic accords the referendum an important place. Article 3 declares that "national sovereignty belongs to the people, who exercise it through their representatives and by referendum." According to article 11 the subjects of referenda are the organization of the public powers, Community Agreements, and treaties which would affect the functioning of institutions. General De Gaulle has interpreted these provisions liberally and in a manner which has led to criticism.²²⁶ In April of 1962 he used the referendum as a source of temporary legislative power. The main objective of the referendum was to approve the peace terms concluded with the Algerian rebels on March 18 and the Government's declaration of March 19 relative to the future of Algeria. Article 2 of the referendum empowered the President to "enact, through ordinances, or as the case may be, through decrees agreed on by the Cabinet, all legislative or administrative [*réglementaire*] measures relative to the application of the Government's declaration of March 19, 1962." Whether the *Conseil d'Etat* could review these measures was a new and difficult question. The Constitution gave no guide; indeed, it said nothing at all about the whole procedure.

The most analogous of existing institutions was the article 38 ordinance; and this analogy was favorable to review.²²⁷ The President, like the Government, is part of the executive branch. In both cases the "legislator" gives the executive temporary permission to enter the domain of the law in order to carry out the legislator's will.²²⁸ In each case there is a specific goal: "the application of the Government's declarations of March 19, 1962," and "the execution of its [the Government's] program" (article 38). And in each case there is a limited time: until the new Algerian institutions have been established, in the case of the referendum, and "within a limited period of time" in the case of article 38.²²⁹

However, the language of the referendum itself seemed to militate against this view. The dual reference to ordinances and decrees, and to legislative and administrative (*réglementaire*) measures would indicate that the ordinances have legislative force and thus are free from review.²³⁰ And the analogy to article 38 can be rejected since there is no ratification. Admittedly, ratification by another referendum would be

²²⁶ E.g., Duverger, *op. cit. supra* note 200, at 50-57. See Chapsal, *La Cinquième République* 72 (Les Cours de droit 1962-63).

²²⁷ De Laubadère, *Les arrêts Canal et Brocas*, [1962] *Actualité Juridique* 612, 613.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ Debbasch, note to Canal, [1963] *Semaine Juridique* 13068.

unwieldy, but ratification by Parliament could have been provided for.²³¹

In a major decision, laden with dramatic political consequences, the Conseil held referendum ordinances reviewable.²³² In the early months of 1962 the Secret Army Organization (O.A.S.), a terrorist organization pledged to prevent De Gaulle from conceding Algeria's independence, stepped up its attacks in France. The previous September the O.A.S. had almost succeeded in assassinating the General himself and were to try again.²³³ For De Gaulle the elimination of these "blood-drenched madmen"²³⁴ became a predominant concern. Yet the military court he had established under article 16 to deal with the military supporters of the O.A.S. seemed half-hearted in its dedication. In May it sentenced General Salan, head of the O.A.S., to life imprisonment despite the Government's strong request for the death penalty. Dissatisfied with his tribunal, De Gaulle dissolved it and set up another one on June first: The Court of Military Justice.²³⁵ Unlike the previous court, this court was established via an ordinance which De Gaulle promulgated under the power granted in the April referendum. The Court of Military Justice began operations immediately and imposed sentences of satisfactory severity. On September seventeenth it condemned to death Andre Canal, an O.A.S. leader, whose arrest had provided the only moment of humor in that group's tragic history.²³⁶ Canal thereupon brought a *recours pour excès de pouvoir* before the Conseil, attacking the ordinance which created the military court.

The Conseil rendered its decision on October nineteenth.²³⁷ It held that referendum ordinances were exercises of the *pouvoir réglementaire* and hence reviewable administrative acts.²³⁸ The object of the referendum was found to be "not to enable the President of the Republic to

²³¹ Ibid.

²³² Canal, Conseil d'Etat, Oct. 19, 1962, [1962] C.E. 552, [1962] D.J. 687.

²³³ Werth 271, 292-93.

²³⁴ Id. at 290.

²³⁵ "The fearful *crise de conscience* this whole sorry business had created among part of the army elite may be judged from the fact that, soon after his appointment to the new Court, General de Larminat [the presiding judge] committed suicide." Werth 289.

²³⁶ Canal, known as "Black Monocle," was arrested on May 5, 1962 after the Government received word that he was hiding in an apartment building in the seventeenth arrondissement of Paris. The Government sent special agents, disguised as house painters, to the scene. The "painters" arrested Canal when he left the building. However, an alert bystander telephoned the Paris Police and reported that a group of house painters were attempting to kidnap someone in the seventeenth arrondissement. The police arrived on the scene, and the "painters" had to prove their identity before they could take Canal to jail. See *Le Monde*, Sept. 9-10, 1962, p. 6, col. 4.

²³⁷ [1962] C.E. 552, [1962] D.J. 687.

²³⁸ An ordinance "conserve le caractère d'un acte administratif et est susceptible, comme tel, d'être déféré au Conseil d'Etat par la voie du recours pour excès de pouvoir."

exercise the legislative power himself, but only to authorize him exceptionally to use . . . his *pouvoir réglementaire* to take, by means of ordinances, measures which are normally within the domain of the law. . . ." Thus by continuing to regard the President as an administrative official, despite contrary arguments which might be drawn from the nature of the new regime, the Conseil had ensured judicial control over this type of law-making. The holding on the merits made clear that this control was more than a mere paper guarantee; the Conseil struck down the ordinance creating the court. It held that the referendum did empower the President to create a military court. However, the President had to respect the general principles of penal law (*garanties essentielles de la défense*), unless the gravity of the circumstances necessitated violation of these principles. In view of the court's organization—it had no civilian members—and because its decisions were specifically declared nonappealable, the Conseil held that the general principles had not been respected.

The Government's reaction was immediate and violent. Shortly after the decision was announced, the Prime Minister's office issued a communiqué denouncing it as an "encouragement of subversion and assassination."²³⁹ The communiqué reproached the Conseil for substituting "the judgment of the administrative court in place of the rights of the constitutional authorities chosen by the voters in an area which touches on their fundamental responsibility and on the very existence of the nation."²⁴⁰ Subsequently the Government rebuked the Conseil for having "exceeded its proper sphere" (*sorti de son domaine*) and indicated that it intended to disregard the decision.²⁴¹

There loomed the ominous prospect of a direct clash between the Government and the Conseil. The day after the decision Canal took an appeal from his conviction to the Court of Criminal Appeals (the *Chambre Criminelle* of the *Cour de Cassation*).²⁴² Yet the Government had indicated it considered the Conseil's decision invalid, and Canal's lawyers were worried that the sentence of death would be carried out.²⁴³ Fortunately, a direct confrontation was avoided. On November twenty-eighth De Gaulle "commuted" Canal's sentence to life imprisonment (indicating that in his mind there was still a valid sentence to commute).²⁴⁴ And in January Parliament passed a law which appeared to

²³⁹ Le Monde, Oct. 21-22, 1962, p. 4, col. 3.

²⁴⁰ Ibid.

²⁴¹ Le Monde, Oct. 26, 1962, p. 6, col. 5.

²⁴² Le Monde, Oct. 23, 1962, p. 3, col. 3.

²⁴³ Ibid.

²⁴⁴ Le Monde, Nov. 29, 1962, p. 1, col. 4.

validate the actions of the Special Military Court.²⁴⁵ On March 14, 1963, Canal withdrew his appeal.²⁴⁶

But the Government's displeasure at the decision continued unabated. Rumors began to circulate that an upcoming reform of the Conseil would, in fact, reflect this displeasure.²⁴⁷ In particular, it was feared the reform would make serious inroads on the Conseil's power to review the exercise of the *pouvoir réglementaire*.²⁴⁸ The prospect of curbing the Conseil sharply aroused public opinion, and the Conseil's role was vigorously defended.²⁴⁹ Perhaps because of this strong reaction, the ultimate reform did not affect the Conseil's jurisdiction.²⁵⁰ Its power to review executive law-making had emerged intact from this "struggle for judicial supremacy."

It is doubtful that the particular control established in *Canal* will ever again be effective. As was pointed out in connection with article 16, the fact that the President is now elected by universal suffrage militates against review of his actions.²⁵¹ Furthermore, the referendum ordinances promulgated in 1962 are no longer subject to challenge. On January 15, 1963, Parliament created a Court of State Security. Article 50 of the law declares that "the ordinances promulgated by virtue of Article 2 of [the April 1962 Referendum] have and continue to have the force of law from the date of their publication."²⁵²

In general it would seem that the Conseil's control over executive law-making can only be effective in cases involving the Government (article 37 decrees and article 38 ordinances). The President's relative immunity from control is the logical consequence of his new importance. The Fifth Republic is different from the parliamentary democracies which preceded it, and the man, whom article 5 declares to be "the guarantor of national independence, the integrity of the territory, and the respect of Community Agreements and of treaties" can hardly be viewed as a mere administrative official. (One might also say this of a Government which "determines and conducts the policy of the Nation.") In any event, presidential law-making is likely to remain the exception rather than the rule.

In conclusion it is not the intent of this article to suggest that France

²⁴⁵ See text at note 252 *infra*.

²⁴⁶ *Le Monde*, March 15, 1963, p. 4, col. 6.

²⁴⁷ Silvera, *La réforme du Conseil d'Etat*, [1963] *S. Chron.* 51, 59.

²⁴⁸ *Ibid.*

²⁴⁹ E.g., Duverger, *Conseil d'Etat ou Conseil du Roi?* *Le Monde*, June 6, 1963, p. 1, col. 3.

²⁵⁰ Drago, *Some Recent Reforms of the French Conseil d'Etat*, 13 *Int'l & Comp. L.Q.* 1262, 1284 (1964).

²⁵¹ See text at note 225 *supra*.

²⁵² Law Number 62-23, Jan. 15, 1963, *Journal Officiel*, Jan. 16, 1963, p. 508.

in on the verge of enthusiastically embracing judicial review of legislation. Nonetheless, the traditional picture of monolithic hostility needs to be modified. Influential jurists are arguing for the institution of judicial review.²⁵³ Perhaps also its existence in neighboring countries will have some effect.²⁵⁴ In view of the lowering of Parliament's status, many of the old arguments against judicial review have lost their force.²⁵⁵ Most important is the example of the *Conseil d'Etat*, an example which proponents of judicial review have invoked in the past.²⁵⁶ In its case law developing the *recours pour excès de pouvoir* the Conseil has shown the importance of an impartial judiciary as a bulwark against governmental excesses. And to the extent that the executive makes "law," the Conseil has engaged in judicial review of that law. Indeed, this control may assume greater importance in view of the Fifth Republic's extension of executive law-making in article 37.²⁵⁷ It is true that the Conseil's use of this power has been restrained, and the measures annulled have generally been of secondary importance. Nonetheless, it may well be that the existence of this power and its general acceptance constitutes an important first step on the road to judicial review.

²⁵³ Professor Duverger, for example, is a member of this group.

²⁵⁴ For a general survey, see Cappelletti & Adams.

²⁵⁵ Duverger, *op. cit.* supra note 200, at 172-73.

²⁵⁶ See Constitutional Committee of the Second Constituent Assembly, session of July 11, 1946, remarks of M. Bardoux, translated in von Mehren 161.

²⁵⁷ Chapus, *De la soumission au droit des règlements autonomes*, [1960] D. Chron. 119, 126.